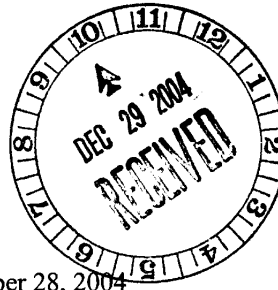


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December 28, 2004

## VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20006

212876  
**ENTERED  
Office of Proceedings**

**DEC 29 2004**

**Part of  
Public Record**

Re: **Finance Docket No. 34645**  
**The Burlington Northern and Santa Fe Railway Company --**  
**Acquisition and Operation Exemption -- State of South Dakota**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Petition for Stay of the State of South Dakota**, dated December 28, 2004.

One extra copy of the Petition and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

Myles L. Tobin  
Attorney for State of South Dakota

MLT:tjl

Enclosures

cc: Mr. Paul H. Markoff, Office of Proceedings

[Contains Color Copies]

BEFORE THE  
SURFACE TRANSPORTATION BOARD

ORIGINAL



\_\_\_\_\_  
FINANCE DOCKET NO. 34645

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
-- ACQUISITION AND OPERATION EXEMPTION --  
STATE OF SOUTH DAKOTA

212876

**PETITION FOR STAY OF  
THE STATE OF SOUTH DAKOTA**

ENTERED  
Office of Proceedings

DEC 28 2004

Part of  
Public Record

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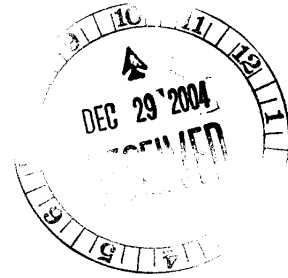
**ATTORNEYS FOR  
STATE OF SOUTH DAKOTA**

Dated: December 28, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34645

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
-- ACQUISITION AND OPERATION EXEMPTION --  
STATE OF SOUTH DAKOTA



**PETITION FOR STAY OF  
THE STATE OF SOUTH DAKOTA**

The State of South Dakota (the "State") hereby seeks stay of the notice of exemption filed in this proceeding on December 23, 2004 by The Burlington Northern and Santa Fe Railway Company ("BNSF"), pending resolution of a forthcoming petition to partially revoke or reject BNSF's notice that the State will shortly file. BNSF's prosaic notice of exemption in reality foreshadows a significant and permanent restructuring of the railroad infrastructure and the dynamics of rail service in South Dakota that requires the Board's careful consideration and the imposition of appropriate conditions under 49 U.S.C. § 10901(c). The notice's arrival at this particular time is apparently intended to influence pending issues in litigation between the parties, and to allow BNSF to argue that a state court can and should compel the State to transfer the rail lines at issue (the "Core Lines") to BNSF prior to the full exercise of the Board's jurisdiction over such a transaction. Stay is warranted here to protect the Board's jurisdiction and assure that the public interest in adequate rail transportation in the State of South Dakota can be properly addressed and protected.

In addition, BNSF's notice of exemption is procedurally inadequate and incomplete in any number of critical respects -- shortcuts likely driven by BNSF's desire to

present the state court with what it can argue is a "concluded" regulatory proceeding. BNSF has filed its notice under the seven-day effectiveness provisions of 49 C.F.R. § 1150.32-.34, even though the regulations and precedent -- including BNSF's own handling of a prior, nearly identical transaction with the State -- require the transaction to be handled under the more thorough 35-day procedures of 49 C.F.R. § 1150.35. BNSF does not intend to comply as it must with the modified certificate termination procedures of 49 C.F.R. § 1150.24 prior to acquiring the Core Lines, once again in plain contradiction of the Interstate Commerce Commission's directives in the directly analogous prior proceeding involving BNSF and the State. And BNSF does not address, reference or seek waiver of the 60-day advance labor notice requirements that apply to the class exemption BNSF seeks to invoke. 49 C.F.R. §§ 1150.32(e); 1150.35(a).

Ultimately, the State does not anticipate opposing regulatory approval of BNSF's acquisition of the Core Lines, subject to satisfaction of the conditions of whatever contractual purchase option rights BNSF may have. But obviously BNSF needs to seek such regulatory approval in the proper form and manner. And any such approval must subject to conditions that will protect the public interest and assure that the relevant criteria of 49 U.S.C. § 10901 are satisfied. Until those prerequisites are satisfied, a stay of BNSF's notice of exemption is necessary and warranted.

#### **BACKGROUND**

The State currently owns a number of rail lines in South Dakota and Iowa that previously were owned by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (the "Milwaukee Road"). The portions of those lines at issue here extend from Aberdeen through Wolsey, Mitchell and Elk Point, South Dakota to Sioux City, Iowa, and from Mitchell through Canton to Sioux Falls, South Dakota (collectively, the "Core Lines").

The Milwaukee Road entered bankruptcy in 1977, and received requisite approval from the ICC and the bankruptcy court to abandon the Core Lines in 1980. Richard B. Olgivie, Trustee of the Property of Chicago, Milwaukee, St. Paul & Pacific Railroad Company -- Abandonment -- In South Dakota, Iowa and Nebraska, Docket No. AB-7 (Sub-No. 88) (ICC served May 14, 1980); In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor, No. 77 B 8999 (N.D. Ill., June 9, 1980), Order No. 342A. Pursuant to an agreement between the State and the Milwaukee Road trustee approved by the bankruptcy court on October 27, 1980, the State in 1981 acquired the abandoned Core Lines from the Milwaukee Road estate. See Simmons v. ICC, 697 F.2d 326, 329-330 (D.C. Cir. 1982); cf. Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149, 1167-1170 & n.40 (7<sup>th</sup> Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

The State then entered into an agreement with Burlington Northern Railroad Company ("BN"), BNSF's predecessor, under which BN would provide rail service on the Core Lines and certain other state-owned rail lines.<sup>1</sup> BN obtained a Modified Certificate of Public Convenience and Necessity under 49 C.F.R. § 1150, Subpart C to operate the state-owned Core Lines. Burlington Northern Railroad Company -- Operations -- In the States of IA and SD, Finance Docket No. 29672 (ICC served August 17, 1981). BN and its successor BNSF have operated the state-owned Core Lines pursuant to its Modified Certificate authority since 1981.

BNSF has recently commenced state court litigation against the State to enforce an alleged contractual option to purchase the Core Lines from the State. The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Case No. 04-470 (S.D. 6<sup>th</sup>

<sup>1</sup> The initial agreement between the State, acting through its South Dakota State Railroad Board, and BN was dated December 22, 1981. The State and BN subsequently entered into another agreement, dated July 10, 1986 and amended August 7, 1991, providing for such rail service (the "Operating Agreement"). A copy of the Operating Agreement as amended is attached as Exhibit 2 to BNSF's notice of exemption.

Circuit), complaint filed October 12, 2004. BNSF asks the state court to compel specific performance of such a purchase option -- that is, it seeks to have the court order the transfer of the Core Lines from the State to BNSF. E.g., BNSF Complaint at ¶ 4 ("... BNSF has brought this action seeking specific performance of the State's contractual duties to ... complete the sales transaction ..."); BNSF Complaint at ¶ 20 ("Since real property is the subject matter of the Operating Agreement, damages would not adequately compensate Plaintiff for Defendant's refusal to convey the property."); BNSF Complaint, Request for Relief ¶ 3 (seeking "[a] decree directing that immediately upon the deposit of said purchase price with the Court, that Defendant make, execute, and deliver to Plaintiff good and sufficient title and/or deed to the [Core Lines]."); BNSF Complaint, Request for Relief ¶ 4 (seeking "[a] decree appointing, authorizing, and directing the Clerk of the Court to make, execute, and deliver such title and/or deed to Plaintiff, if Defendant fails to do so within a time fixed by the Court.").

On December 10, 2004, the State filed a motion to dismiss BNSF's complaint, on the basis (as relevant here) that the state court had no jurisdiction to order the physical transfer of rail lines in the absence of appropriate consideration and approval of such a transaction by the STB. Argument and a potential decision on that motion is currently scheduled for January 6, 2005. BNSF's filing of its notice of exemption is in direct response to the State's state court motion, as BNSF expressly admits. BNSF Notice of Exemption at 3. BNSF apparently will seek to argue that, with the filing of the notice, the STB's jurisdiction and regulatory role has been satisfied and the court can proceed to consider BNSF's request for specific performance. Thus, without stay of the notice of exemption, the court could potentially implement the transfer of the Core Lines to BNSF anytime after January 6<sup>th</sup>.

## DISCUSSION

The standards for a petition to stay are 1) whether petitioner is likely to prevail on the merits; 2) whether petitioner will be irreparably harmed in the absence of a stay; 3) whether issuance of a stay would substantially harm other parties; and 4) whether issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Here, each of those criteria are met and BNSF's notice of exemption should be stayed pending action on the State's forthcoming petition to partially revoke or reject.

### **1. Likelihood of Success on the Merits**

#### **A. BNSF's Notice is Procedurally Inadequate and Incomplete**

BNSF, a Class I carrier and the nation's second-largest railroad, has filed its notice of exemption to acquire the Core Lines under the expedited procedures of 49 C.F.R. §§ 1150.32-.34, which apply to "transactions that involve creation of Class III carriers." BNSF offers no explanation or justification for its invocation of that class exemption, which is directly inconsistent with its own treatment (and the ICC's consideration) of an analogous acquisition of a State-owned line in 1992. Burlington Northern Railroad Company -- Acquisition and Operation Exemption -- South Dakota Railroad Authority, Finance Docket No. 32017 (ICC served April 2, 1992) ("BN/Terry Line") (BN acquisition of State-owned East-West line between Ortonville, Minnesota and Terry, Montana, across northern tier of South Dakota). In that case, as here, the State had acquired the line after its abandonment by the Milwaukee Road bankruptcy estate, BN had operated the line pursuant to a Modified Certificate, and BN subsequently sought to exercise a purchase option for the line. BN invoked there the procedures of 49 C.F.R. § 1150.35, and in accordance with that regulation filed a notice of intent 35 days before the anticipated

consummation date,<sup>2</sup> filed a notice of exemption 21 days before the anticipated consummation date, and provided actual notice to significant shippers on the line and other interested parties. The ICC specifically noted that BN had "properly invoked" the class exemption procedures applicable to its acquisition of the State-owned East-West line. BN/Terry Line at 2.

There is no viable regulatory distinction between BN's 1992 acquisition of the East-West line and its current attempted acquisition of the Core Lines, and no principled reason why the regulatory procedures utilized and endorsed in 1992 are not applicable here. This is particularly true given that the freight revenues on the Core Lines which BNSF seeks to acquire themselves exceed the revenue ceilings for Class III carriers.<sup>3</sup> Any other outcome would allow Class I railroads to use the expedited seven-day procedures of 49 C.F.R. § 1150.32-.34 for any Section 10901 transaction -- regardless of its size -- and thus place Class Is in a more favorable position under the regulations than a Class III carrier attempting a similar transaction. There is obviously no legal or logical basis for such a position, and it is clear that BNSF's attempt to proceed under the abbreviated provisions of 49 C.F.R. § 1150.32-.34 is inappropriate.<sup>4</sup>

The 1992 BN/Terry Line decision also required BN to comply with the requirements of 49 C.F.R. § 1150.24 and provide the required notice of its termination of

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<sup>2</sup> A copy of the notice of intent filed by BN in Finance Docket No. 32017 is attached as Exhibit C.

<sup>3</sup> Pursuant to the compensation provisions of the Operating Agreement between the parties, BNSF reports annual gross revenues derived from originating and terminating traffic on the Core Lines to the State. Such revenues are well in excess of \$80 million annually.

<sup>4</sup> Cf. Buffalo & Pittsburgh Railroad, Inc. -- Operation Exemption -- Lucerne Branch in Pennsylvania, Finance Docket No. 31372 (ICC served December 16, 1988) at 2, n.3 (transactions by Class I or Class II railroads under 49 C.F.R. § 1150, Subpart D governed by the 35-day procedure where projected revenues for involved lines exceed those of a Class III carrier). We also note that, since passage of the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 806, BNSF itself has apparently questioned whether any class exemption from 49 U.S.C. § 10901 is available for Class I rail carriers. Burlington Northern Railroad Company -- Operation Exemption -- In Mills and Pottawattamie Counties, IA, Finance Docket No. 32977 (STB served March 12, 1997).

modified certificate operations on the line to be acquired. BN/Terry Line at 3, n.4. Such a notice would be meaningless and indeed moot if it was not given before the actual acquisition transaction occurred. See BN/Terry Line at 3 ("[Modified certificates apply only to operations over State owned lines. There, after BN acquires this line, its modified certificate authority will no longer be valid." (emphasis in original)). In 1992 BN in fact gave the required notice prior to proceeding with acquisition of the line. See BN letter filing dated April 27, 1992 and attached Notice filed in Finance Docket Nos. 29907 and 32107, attached hereto as Exhibit D.

In its current notice, however, BNSF indicates that it will give the required notice of termination under Section 1150.24 after its acquires the Core Lines from the State.<sup>5</sup> That is clearly inappropriate and inconsistent with the ICC's clear directive in BN/Terry Line.

Finally, BNSF fails to address -- or even reference -- the 60-day labor notice requirements of 49 C.F.R. § 1150.32(e) that govern BNSF's notice of exemption. Assuming the \$5 million revenue threshold is met (which here it obviously is), the notice requirement applies to a modified certificate operator's acquisition of the line it operate, just as it would to any other transaction subject to the Section 10901 class exemption. Brandywine Valley Railroad Company -- Modified Certificate, Finance Docket No. 33722 (STB served March 26, 1999) at 2. BNSF may believe that a waiver of the notice requirement would be desirable in this case, but in the absence of a request for such a waiver and without the certification required by 49 C.F.R. § 1150.32, BNSF's notice of exemption is deficient and incomplete.<sup>6</sup>

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<sup>5</sup> BNSF Notice of Exemption at 3 ("Once it has acquired the Core Lines, BNSF will notify the appropriate parties that it will cease providing service under the Modified Certificate but will continue providing service pursuant to this Notice of Exemption.").

<sup>6</sup> BNSF's notice contains a cursory statement that "[t]his acquisition will have no impact on rail labor" and that "no employees will be adversely affected by this exemption." BNSF Notice of Exemption at 3. A finding that such unilateral carrier statements are sufficient to satisfy the notice requirements of 49 C.F.R. § 1150.32(e) (and the parallel requirements in other parts of the regulations) would

In each of these instances, there is a strongly likelihood that BNSF has either failed to invoke the proper class exemption or has invoked the exemption in an inadequate or incomplete manner. A stay while the Board and/or BNSF address these deficiencies is warranted.

B. Partial Revocation of BNSF's Exemption and Imposition of Conditions is Warranted

The standard for revoking an exemption, in whole or in part, is whether regulation is needed to carry out the Rail Transportation Policy ("RTP") of 49 U.S.C. § 10101. 49 U.S.C. § 10502(d); Minnesota Comm. Ry., Inc. -- Trackage Exempt. -- BN R. Co., 8 I.C.C.2d 31, 35 (1991) ("Minnesota Commercial"). A petition to revoke should be based on reasonable, specific concerns, and the Board's revocation analysis will focus on the sections of the RTP related to the underlying statutory section from which an exemption is sought. Minnesota Commercial, 8 I.C.C.2d at 35-36 (citing Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991)).

Here, 49 U.S.C. § 10901(c) provides that a proposed transaction cannot be approved if it is inconsistent with the public convenience and necessity, and further provides that the Board may impose conditions on the transaction that are "necessary in the public interest." The RTP, in turn, directs the Board (among other relevant things) to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public;" to "foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;" to "prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;" and to allow

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create categorical exclusions from the scope of the requirement that appear nowhere in the language of the regulation or in the STB's decisions.

"competition and the demand for services to establish reasonable rates for transportation by rail."

49 U.S.C. § 10101(1), (4), (5) and (12).

As the State will address further in its forthcoming petition to partially revoke, BNSF's proposed acquisition of approximately 370 miles of main line tracks owned by the State will have a profound and lasting effect on shippers throughout South Dakota and on the national and international movement of grain from the State. Partial revocation of BNSF's exemption to acquire the Core Lines is appropriate and necessary to allow imposition of conditions that will protect the public interest in adequate rail transportation within the State of South Dakota and preserve existing market access options for South Dakota shippers. Particularly given the setting and significance of the proposed Core Lines acquisition and its potential widespread transportation implications, there is a substantial likelihood that the Board will find that partial revocation is required to permit a thorough and adequate analysis of the issues to proceed.

The rail system in South Dakota has been and continues to be a central focus within the State. The State of South Dakota owns over 700 of the 1,840 rail track miles in South Dakota. Since 1982, when the State bought the Milwaukee Road's abandoned East-West line and the Core Lines (at issue in this proceeding) out of the bankruptcy court proceeding, the State has committed well over \$150 million to the purchase and rehabilitation of rail lines throughout the State that nobody else then wanted, in order to preserve market access for South Dakota shippers. The State will not stand idly by and see this market access undermined by BNSF.

Much has changed since the Milwaukee Road bankruptcy in the early 1980's. BNSF bought the East-West line from the State in 1992. Following that purchase, BNSF embarked upon a program of concentrating shipments of grain at 110-car unit grain loaders along the BNSF system -- both on the now BNSF-owned East-West line and on the Core Lines which

it currently operates for the State. As shown on the map attached as Exhibit A, BNSF has promoted a high concentration of 110-car unit grain elevators on the lines which it owns or operates.<sup>7</sup>

These 110-car elevators may be more efficient and economical for BNSF operations, and they have certain benefits for the State too. But, as Exhibit A shows, the State's shipping population consists of far more than just 110-car elevators along BNSF's lines. Many smaller shippers dot the landscape on rail lines throughout the State. These shippers are increasingly being squeezed out by BNSF, and they will be hit hard by this acquisition if the STB does not work to help preserve the existing market access which the State has so carefully crafted.

As detailed in the representative affidavits of various South Dakota shippers attached as Exhibits E-F, BNSF has developed a rate structure for South Dakota grain movements which effectively precludes non-110-car loaders (predominantly those located on the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E")) from accessing the lucrative Pacific Northwest grain export markets.

Since BNSF would not promote this Pacific Northwest export market access for smaller South Dakota shippers, the State stepped in and, once again, filled the void. It purchased 70 miles of dilapidated out-of-service rail lines north of Aberdeen. South Dakota Railroad Authority -- Acquisition Exemption -- The Burlington Northern and Santa Fe Railway Company, Finance Docket No. 34125 (STB served January 18, 2002); South Dakota Railroad Authority -- Acquisition Exemption -- Rutland Line, Inc., Finance Docket No. 34216 (STB served August 8, 2002). These rail lines, coupled with the Core Lines extending south from Aberdeen, and an

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<sup>7</sup> 110-car unit grain loading elevators are shown in blue on Exhibit A.

agreed upon interchange with BNSF for access across BNSF's lines at Aberdeen, would allow non-110-car loaders on DM&E, who had been shut out by BNSF, to access the Pacific Northwest and Canadian markets as an outlet for South Dakota grain. However, BNSF has reneged on its interchange agreements at Aberdeen. Even though DM&E can access BNSF's Aberdeen yard and the State (through its third-party operator) can similarly access that yard, and their respective crews can literally look at each other across the yard tracks, BNSF asserts that paper barriers exist in the State's and DM&E's agreements which preclude interchange of traffic between them. So, BNSF has placed South Dakota small shippers between the proverbial "rock and hard place." On the one hand, BNSF rate actions preclude small shipper access to the Pacific Northwest export markets, and on the other hand, BNSF has attempted to blockade access to Canada and the Pacific Northwest through assertion of purported paper barriers at Aberdeen.

The Aberdeen blockade issue is currently the subject of litigation between the State and BNSF in Federal Court, and the affidavits attached hereto were filed in that proceeding. But, regardless of the outcome of that court proceeding, the Board cannot sit idly by and allow BNSF to consolidate its hold on South Dakota shippers without preserving this Northern access route.

As asserted in BNSF's Notice of Exemption, BNSF has operated the 370-mile Core Line trackage for the State since 1981. However, BNSF is not the only railroad which operates State-owned lines. As shown on Exhibit B, at the behest of the MRC Regional Railroad Authority the Dakota Southern Railroad operates the State-owned line between Mitchell and Kadoka, South Dakota, connecting with the Core Lines at Mitchell.<sup>8</sup> Similarly, at the behest of

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<sup>8</sup> The MRC/Dakota Southern line is shown in blue diamonds in Exhibit B. The Core Lines operated by BNSF are shown in green diamonds.

the Sioux Valley Regional Railroad Authority, the D&I Railroad operates the State-owned lines between Canton and Elk Point and between Beresford and Hawarden, South Dakota, connecting with the Core Lines at Canton and Elk Point.<sup>9</sup> Thus, through a series of third-party operating agreements with various carriers, the State has created a seamless network of rail trackage throughout the State. If an operator is not providing sufficient service, that operator could be removed. If the State deems that additional third-party carrier access is needed on a particular rail line, it could invite that additional access. The agreements contemplate cooperation by all parties.

Despite the cooperative intent of the various operating agreements, BNSF has steadfastly refused to allow third-party trackage rights access on the State-owned Core Lines. Although the State has repeatedly requested BNSF's cooperation in this regard, BNSF has uniformly declined such third-party access, asserting that its consent is required pursuant to its Operating Agreement and that no such consent would be forthcoming. Accordingly, the State has moved forward and has granted third-party trackage rights to the MRC Regional Railroad Authority for operation by Dakota Southern over the Core Lines between Mitchell, South Dakota and Sioux City, Iowa, in Finance Docket No. 34630, MRC Regional Railroad Authority -- Trackage Rights Exemption -- Lines of State of South Dakota and Finance Docket No. 34630 (Sub-No. 1), Dakota Southern Railway Company -- Trackage Rights Exemption -- MRC Regional Railroad Authority. Additionally, the State has granted third-party trackage rights to the Sioux Valley Regional Railroad Authority for operation by D&I Railroad over the Core Lines between Elk Point, South Dakota and Sioux City, Iowa, in Finance Docket No. 34646, Sioux Valley Regional Railroad Authority -- Trackage Rights Exemption -- Lines of State of

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<sup>9</sup> The Sioux Valley/D&I line is shown in orange diamonds on Exhibit B.

South Dakota and Finance Docket No. 34646 (Sub-No. 1), D&I Railroad Company -- Trackage Rights Exemption -- Sioux Valley Regional Railroad Authority.

These trackage rights preserve the structure which the State has already created. Each individual State-owned line has access to multiple Class I carriers at Sioux City, not just to BNSF.

BNSF has refused to consent to these trackage rights and has asserted in its separate state court action that it is not obligated to provide such consent. While the State obviously disagrees with that assertion, the issue for the STB here is whether it will allow the acquisition of the Core Lines by BNSF to "alter the landscape" and eradicate the seamless transportation system which the State had previously created. The State's petition for partial revocation will seek to prevent this undermining of the transportation network by requiring imposition of the MRC/Dakota Southern and Sioux Valley/D&I trackage rights as a condition of the sale. Failure of the STB to impose these conditions will relegate these State-owned lines to island operations subject to the vagaries of what will become BNSF's unfettered and unilateral rate-making practices, which are designed to shift traffic away from the smaller elevators on non-BNSF lines to the large 110-car lines on the BNSF system. This fundamental change in the South Dakota rail system is not appropriately addressed in a seven-day class exemption proceeding.

**2. Harm to the State, the Public and Other Interested Parties**

As discussed above, the filing of BNSF's Notice of Exemption appears timed to allow BNSF to argue to the state court in the parties' pending litigation that the federal regulatory process is complete and that the court now has the jurisdiction to compel the actual transfer of the Core Lines from the State to BNSF. In the absence of a stay, such a transfer could

potentially be accomplished by judicial fiat, even while significant transportation and regulatory issues subject to the Board's jurisdiction remained before the agency. The State would certainly argue that any conditions imposed by the Board after the fact would be binding on the state court's decision mandating the transfer, but the potential for conflict between the court's imposition of the transaction and the STB's review of the transaction is manifest.

In such circumstances, a likelihood of irreparable harm in the absence of a stay is faced by numerous parties and interests. The State faces a forced divestiture of the Core Lines without any review on the merits by the Board, and uncertainty as to how any remedies it later obtains from the Board would be effectuated in the context of a court-ordered transfer. The Board itself faces a cloud on its exclusive and plenary jurisdiction over line transfers like the subject transaction, and the potential difficulties of partially unwinding not a consensual transaction already consummated by the parties but an involuntary transaction ordered by a court. Shippers and other interested parties entitled to receive notice of termination of BNSF's modified certificate authority on the Core Lines under 49 C.F.R. § 1150.24 have no remedy if a court-ordered line sale occurs before such notice is given and effective. The same would be true for any labor interests entitled to receive notice under the provisions of 49 C.F.R. § 1150.32(e).

No other party would be adversely affected by the granting of a stay. As demonstrated in the attached affidavits, there is widespread shipper and public support for the State's efforts to preserve market access and a strong and effective state rail infrastructure for all constituencies in the state. The public interest will be advanced by allowing a thorough and considered review of the significant and permanent restructuring of rail service and relationships that BNSF proposes. Existing BNSF customers on the Core Lines will see no change in their

service from what existed previously or what BNSF says would exist after the transaction is completed. BNSF Notice of Exemption at 3.

**3. Harm to BNSF**

The requested stay will result in no harm to BNSF. As indicated above, BNSF has failed to comply with the Board's class exemption regulations in several significant respects, and will require upwards of 60 days to remedy those inadequacies in any event. BNSF's notice provides no indication that an immediate closing of the Core Lines purchase is required, that BNSF has taken any action or foregone any action in anticipation of an immediate closing, or that any other party has detrimentally relied upon a representation that the transaction would occur immediately upon the anticipated effective date of the exemption. Indeed, the legitimate motivations and reasons for BNSF's pursuit of a Core Lines transfer at this particular time remain unclear.

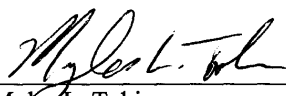
**CONCLUSION**

The normally tight time frames associated with class exemption proceedings have been exacerbated in this case by the filing of BNSF's notice of exemption at midday on Thursday, December 23<sup>rd</sup> -- immediately before a long holiday weekend at the agency. In other circumstances, the Board has issued an administrative or "housekeeping" stay to allow an adequate opportunity for consideration of petitions for stay. E.g., Iowa, Chicago & Eastern Railroad Corporation -- Acquisition and Operation Exemption -- Lines of I&M Rail Link, LLC, Finance Docket No. 34177 (STB served June 26, 2002). A similar approach may be appropriate here. In any event, the stay criteria of Holiday Tours are more than satisfied in this proceeding, and the Board should stay BNSF's notice of exemption pending a thorough review on the merits

of BNSF's proposed transaction and its potentially significant widespread implications within the State of South Dakota.

WHEREFORE, the State respectfully requests that BNSF's notice of exemption herein be stayed.

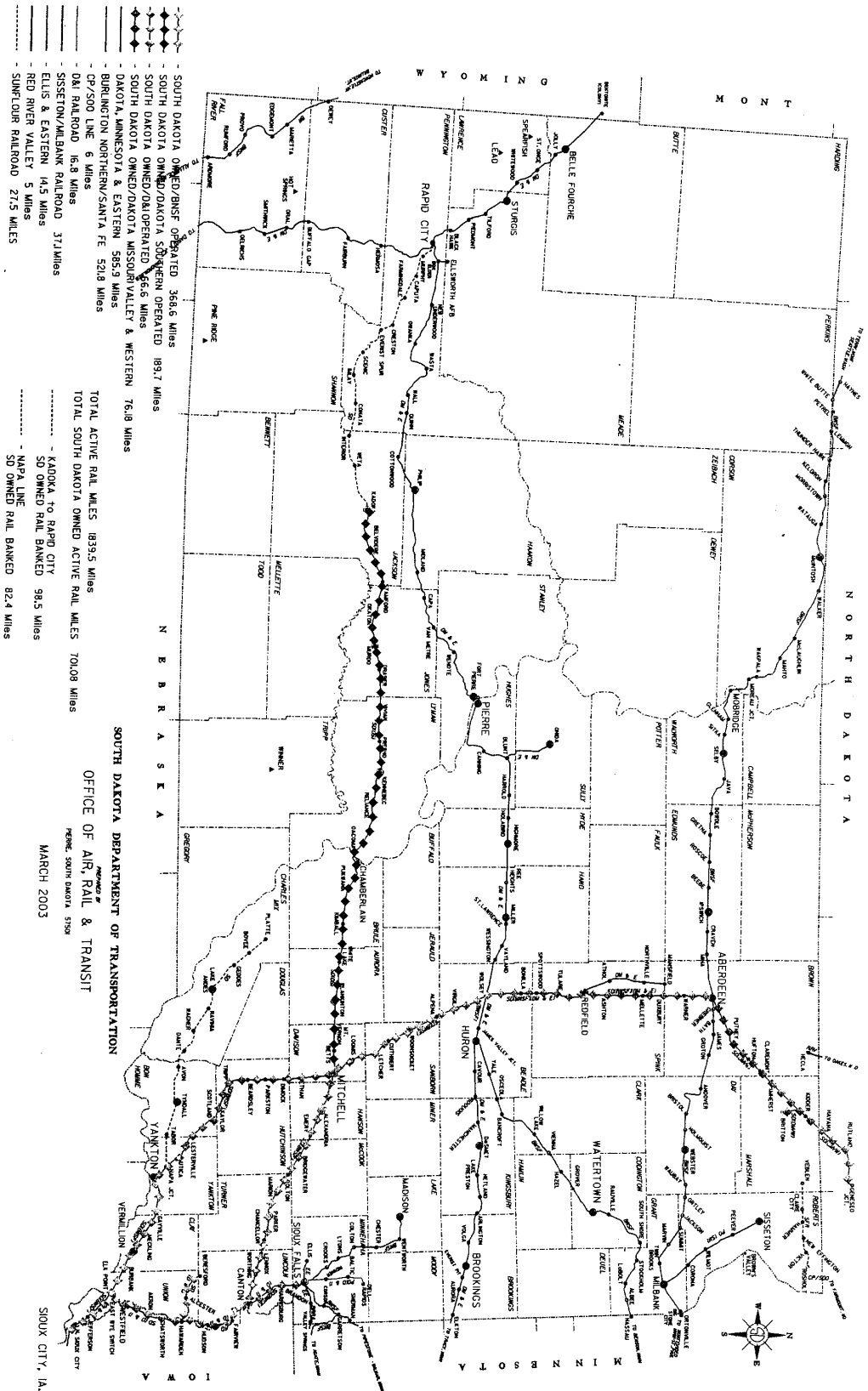
Respectfully submitted,

By:   
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Thomas J. Litwiler  
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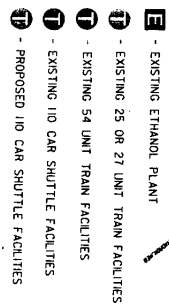
**ATTORNEYS FOR  
STATE OF SOUTH DAKOTA**

Dated: December 28, 2004

# OFFICIAL SOUTH DAKOTA RAIL MAP



**EXHIBIT A**



BEFORE THE  
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32017

BURLINGTON NORTHERN RAILROAD COMPANY--ACQUISITION  
EXEMPTION--SOUTH DAKOTA RAILROAD AUTHORITY

NOTICE OF INTENT TO FILE A NOTICE  
OF EXEMPTION

Burlington Northern Railroad Company ("BN") hereby gives notice of its intent to file a Notice of Exemption under 49 C.F.R. §§ 1150.31 et seq. The Notice of Exemption will be filed on March 11, 1992, and will be effective on April 1, 1992. The exemption covers BN's acquisition of a railroad line from the South Dakota Railroad Authority ("SDRA") extending from Milepost 600.7 near Ortonville, MN, to Milepost 1080.6 near Terry, MT, ("the rail line" or "the line") a distance of approximately 484 miles (the mileage differs from that obtained by comparing mileposts due to track equations). A map showing the line covered by this exemption is attached as Exhibit No. 1.

BN has provided common carrier rail service over this former Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road") line segment since April 19, 1982. Prior to that time, the Milwaukee Road had embargoed its operations west of Ortonville, MN and had discontinued

its mainline service to the State of South Dakota ("State"). Following cessation of rail operations resulting from the Milwaukee Road embargo, the segment was purchased by the State for approximately \$30 million. This acquisition was financed through non-recourse notes issued by SDRA. These notes were sold to purchasers utilizing BN's credit, and BN (not SDRA) had the obligation to pay principal and interest on the notes. BN has operated this rail line as part of its own railroad system pursuant to a Lease of Rail Facilities and Operating Agreement dated May 26, 1982 ("the Operating Agreement"). BN rehabilitated the line from a deteriorated condition to FRA Class 3 track safety standards through proceeds obtained from a \$30 million redeemable preference share financing which the State and BN arranged with the Federal Railroad Administration ("FRA") in 1982.

Under the terms of the Operating Agreement, BN has had the common carrier obligation to provide railroad service on this line segment since service was reestablished in 1982. In addition, the Operating Agreement required BN to directly assume SDRA's acquisition and rehabilitation financing obligations. BN obtained Interstate Commerce Commission ("ICC" or "Commission") approval to assume this SDRA debt in Finance Docket No. 29973 on July 8, 1982. As a result, between 1982 and 1991, BN paid the principal and interest obligations on the acquisition and rehabilitation debt and was the equitable owner of the line for tax and other non-regulatory purposes. Under the Operating Agreement, BN

assumed substantially all of the SDRA obligations under (1) the SDRA acquisition agreement with the Milwaukee Road, (2) the SDRA agreement with FRA for the rehabilitation financing, and (3) the note purchase agreements between SDRA and the note purchasers. Thus, BN has had most of the burdens of ownership, other than bare legal title, since May 26, 1982.

In a 1990 transaction, SDRA and BN satisfied the outstanding rehabilitation financing obligations with FRA, and that debt is no longer outstanding. In a subsequent transaction in August, 1991, BN repaid the principal and interest on the State acquisition financing thereby extinguishing that outstanding debt as well. As a result of these two transactions, BN is entitled to take legal title to the rail line under the purchase option provisions of the Operating Agreement for \$1.00. Following ICC exemption authorization of this acquisition, BN will record legal title to this rail line in the appropriate counties in South Dakota, North Dakota and Montana.

BN received its authority to provide rail service on the line pursuant to a Modified Rail Certificate issued by the Commission in Finance Docket No. 29907 on May 4, 1982. BN's operations over the Terry-Ortonville line prior to May 4 were conducted pursuant to service order.

This acquisition will have no impact on rail labor. BN has been the common carrier on this line segment since 1982, and operations by the Milwaukee Road had ceased well before

BN resumed service. BN's operations over this line will not change as a result of taking legal title. As a result, no employees will be adversely affected by this exemption.

Correspondence concerning this proceeding should be directed to the person below:

Michael E. Roper  
Associate General Counsel  
Burlington Northern Railroad Company  
3800 Continental Plaza  
777 Main Street  
Fort Worth, TX 76102-5384  
(817) 878-2359

I certify that the acquisition is not a transaction requiring the preparation of either an Environmental Report or a Historic Report under 49 C.F.R. §1105.5(c)(2)(i) and §1105.8(a)(1).

*Michael E. Roper*

Edmund W. Burke  
Douglas J. Babb  
Michael E. Roper  
Burlington Northern Railroad  
Company  
3800 Continental Plaza  
777 Main Street  
Fort Worth, Texas 76102-5384  
(817) 878-2359

CERTIFICATE OF SERVICE

I certify that on this 24th day of February, 1992, a copy of the foregoing Notice of Intent to File a Notice of Exemption has been sent by first class mail, postage prepaid, to the following:

The Honorable George Mickelson  
Governor  
State Capitol  
500 E. Capitol  
Pierre, SD 57501

Transportation Department  
State of South Dakota  
700 Broadway Ave. East  
Pierre, SD 57501-2586

The Honorable Arne H. Carlson  
Governor  
130 State Capitol  
St. Paul, MN 55155

Transportation Department  
State of Minnesota  
John Ireland Blvd.  
St. Paul, MN 55155

The Honorable Stan Stephens  
Governor  
Governors Office  
204 State Capitol  
Helena, MT 59620

Commerce Department  
Transportation Division  
1424 Ninth Avenue  
Helena, MT 59620-0501

United Transportation Union  
14600 Detroit Ave.  
Cleveland, OH 44107-4250

Brotherhood of Locomotive Engineers  
Standard Bldg.  
1370 Ontario Street  
Cleveland, OH 44113-1702

Keith Kelly, Fuel Supervisor  
Otter Tail Power, Big Stone Plant  
P. O. Box 218  
Big Stone, SD 58653

Rod Nielson, Manager  
Knife River Coal Mining  
P. O. Box 85  
Scranton, SD 58653

Keith Hainy  
Director Operations/Grain Marketing  
South Dakota Wheat Growers Association  
110 S.E. 6th Avenue  
Aberdeen, SD 57402-1460

Milt Strong, Regional Manager  
Harvest States Coop  
P. O. Box 625  
Morris, MN 56267

Dale Aesoph, Superintendent  
Ortonville Stone Company  
P. O. Box 67  
Ortonville, MN 56278

Paul Skarnagel, Manager  
James Valley Farmers Coop  
P. O. Box 195  
Groton, SD 57445

Greg Odde, Manager  
L & O Acres, Inc.  
Route 1, Box 57-A  
Westport, SD 57481

Arnold Peck, Manager  
Bunge Corp.  
P. O. Box H  
Bowdle, SD 57428

Nick Kukla, Manager  
Scranton Equity Exchange Coop  
P. O. Box 127  
Scranton, SD 58653

*Michael E. Roper*  
Michael E. Roper



## BURLINGTON NORTHERN RAILROAD

LAW DEPARTMENT

3800 Continental Plaza  
777 Main Street  
Ft. Worth, Texas 76102

(817) 878-2359

April 27, 1992

Mr. Sidney L. Strickland, Jr.  
Secretary  
Interstate Commerce Commission  
12th & Constitution Ave., N.W.  
Washington, D. C. 20423

Re: Finance Docket No. 29907, Burlington Northern  
Railroad Company--Operation--Between Ortonville, MN  
and Terry, MT; Finance Docket No. 32017, Burlington  
Northern Railroad Company--Acquisition and  
Operation Exemption--South Dakota Railroad  
Authority

Dear Secretary Strickland:

Enclosed is the original and ten copies on a notice of termination of the above-referenced Modified Rail Certificate. The notice is filed pursuant to the Commission's regulations at 49 C.F.R. §1150.24 and will be effective June 26, 1992. Actual operations over the line will continue after that date under the authority granted in Finance Docket No. 32017, served April 2, 1992.

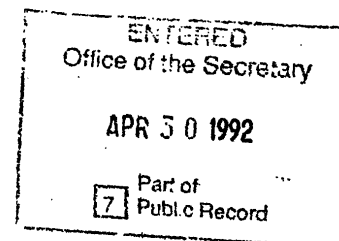
Please return the duplicate of this letter so that I may know the date on which the notice was filed. A copy of the notice has been mailed as required by the regulations.

Sincerely,

*Michael E. Roper*  
Michael E. Roper  
Associate General Counsel

MER/th

Enclosure



Office of Secretary

APR 30 1992

Part of  
Public Record

Finance Docket No. 29907

BURLINGTON NORTHERN RAILROAD COMPANY--OPERATION--  
BETWEEN ORTONVILLE, MN, AND TERRY, MT

Modified Rail Certificate

Finance Docket No. 32017

BURLINGTON NORTHERN RAILROAD COMPANY--ACQUISITION  
AND OPERATION EXEMPTION--SOUTH DAKOTA RAIL  
AUTHORITY

## NOTICE

On April 2, 1992, the Interstate Commerce Commission served a notice of exemption in Finance Docket No. 32017 authorizing Burlington Northern Railroad Company ("BN") to acquire and operate the line of railroad extending from Mile Post 600.7 near Ortonville, MN, to Mile Post 1080.6 near Terry, MT. BN has been operating the line pursuant to a modified rail certificate granted in Finance Docket No. 29907, served May 4, 1982.

BN will cease operations under the authority granted in the modified rail certificate granted in Finance Docket No. 29907 on June 26, 1992. After that date, all future BN operations over this line will be under the authority contained in the notice of exemption in Finance Docket No. 32017. There will be no change in the actual operations on the line as a result of this change in authority.

This notice is being filed pursuant to 49 C.F.R. §1150.24 and is being served on the Commission; the States of Minnesota, Montana, North Dakota and South Dakota; and on

all persons who have used the line within the previous six months.

Any questions concerning this notice should be sent to Michael E. Roper, Associate General Counsel, Burlington Northern Railroad Company, 3800 Continental Plaza, 777 Main Street, Fort Worth, TX 76102-5384. The phone number is (817) 878-2359.

*Michael E. Roper*  
Michael E. Roper

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 1992, a copy of the foregoing notice has been sent by first class mail to the Interstate Commerce Commission, the States of Minnesota, Montana, North Dakota and South Dakota, and all shippers who have used the line within the last six months.

*Michael E. Roper*  
Michael E. Roper

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION**

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THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY, a  
Delaware corporation,

Court File No. Civ. 03-1003

Plaintiff,

**AFFIDAVIT OF KEITH HAINY**

v.

DAKOTA, MISSOURI VALLEY &  
WESTERN RAILROAD, INC., a North  
Dakota corporation,

Defendant.

**CONSOLIDATED WITH**

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION**

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STATE OF SOUTH DAKOTA by and  
through its SOUTH DAKOTA RAILROAD  
AUTHORITY; and DAKOTA, MISSOURI  
VALLEY & WESTERN RAILROAD,  
INC., a North Dakota Corporation,

Court File No. Civ. 03-3012

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY, a  
Delaware corporation,

Defendant.

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I, Keith Hainy, being first duly sworn on oath, deposes and states as follows:

1. I am General Manager of North Central Farmer's Elevator ("North Central") with its main office at Ipswich, SD.
2. I have been General Manager for North Central for the past 6 years, and I have been in the grain business for the past 30 years.
3. North Central is a cooperative association serving North Central South Dakota and the southern part of south-central North Dakota. North Central currently has over 2500 producer-patrons, and "handled" more than 33 million bushels of grain (primarily corn with some soybeans and wheat) in 2001, 29 million bushels of grain in 2002, and 22 million bushels of grain in 2003. Our full handling capacity would be approximately 40 million bushels of grain per year.
4. North Central's grain facilities are located at Ipswich, Northville, Bowdle, Herreid, Pollock, Java, Leola, Onaka, Wecota, Warner and Craven, all in South Dakota. The Northville, Bowdle, Java, Warner and Craven facilities are served by rail.
5. More than 90% of the grain sold by North Central is transported to market by rail. Rail is generally the most efficient and cost effective way to move grain. One jumbo railcar holds the same volume of grain as that carried by four tractor-trailer rigs and rail grain movements can be made in 110-car, 75-car, 54-car (and sometimes 27-car) unit grain trains. Thus, rail transportation is far more efficient and economical than truck transport and, much easier on the South Dakota highway system.
6. Our Craven facility is located on the Burlington Northern and Santa Fe Railroad ("BNSF"), and has the capacity to load 110 cars in a single unit (known as a "shuttle"

facility). Development of the infrastructure necessary to become a 110-car shuttle facility costs in excess of 6 million dollars.

7. As a result of having 110-car capacity at Craven, BNSF has afforded our Craven facility 110-car unit grain train rates for rail movements to the Pacific Northwest, which has traditionally been the best market for South Dakota grain, particularly corn.

8. In light of the expensive infrastructure investments associated with 110-car shuttle trains, it has not been economically feasible for North Central to create 110-car shuttle facilities at any of its other facilities. Nevertheless, substantial amounts of grain can be moved through these other facilities if we have access to markets for delivery of that grain. In this regard, we have repeatedly requested from BNSF's marketing personnel that they provide us with competitive rail rates to the Pacific Northwest export markets from our Northville facility which is located on the Dakota, Minnesota & Eastern Railroad ("DM&E"). BNSF market managers have repeatedly refused to provide us with rail rates out of the Northville facility to the Pacific Northwest. We have even offered to co-load our unit trains with the unit trains of other elevators on the DM&E so that, by the time the trains reached BNSF, they would be in 110-car units. BNSF has refused to accept these trains from Northville, although they have done so for several years in connection with Minnesota shippers.

9. In the grain industry, access to multiple markets is critical. Prices fluctuate from market to market, and in order to attain profitability, elevators such as Northville need to leverage one market against the other depending on the available per bushel prices. For example, the Pacific Northwest export markets have traditionally been one of the strongest grain markets (particularly for corn) in the United States. The inability to access this market puts the

Northville facility at a competitive disadvantage relative to other South Dakota facilities and those in Minnesota and North Dakota (among other states) that can access the Pacific Northwest.

10. Similarly, the Canadian markets in Alberta have provided an excellent and profitable opportunity for South Dakota shippers (if we could have accessed those markets) over the last several years. While that market is down somewhat this year, grain markets tend to be extremely fluid, fluctuating from month to month, and from year to year. In order to remain competitive and to provide optimum prices for our customer and our farmer owners we need to be able to react to these market fluctuations as they occur. That means we need to have access to as many markets as possible in order to source our grain at the best available prices. Access to as many markets as possible is a key to elevator survival.

11. In light of BNSF's refusal to provide rail rates to the Northville facility, DM&E, DMVW and the Canadian Pacific Railroad ("CP") worked to provide alternative opportunities for Northville and other DM&E served elevators to access the Canadian markets, which, at the time, were providing some of the best per bushel corn prices. DM&E, in conjunction with DMVW and CP, published freight tariff 15233-A in which the railroad offered to transport corn from North Central's Northville facility to various locations in Alberta at rates ranging from \$1,980 per car to \$2,030 per car. The tariff was restricted to a minimum of 75 covered hopper cars per unit which met North Central's Northville facility loading capacity.

12. In February of 2003, the Northville facility was able to move two 75-car unit trains of corn under this tariff via a route of DM&E to Aberdeen, DMVW for interchange to the CP in Hankinson, ND. However, on March 13, 2003, BNSF refused to permit the passage of a third train through Aberdeen. That train was held on DM&E for several weeks due to this refusal of BNSF to allow the train to move. Instead of allowing use of the Aberdeen

interchange, BNSF offered to move the train itself from Aberdeen to CP via a circuitous route at a cost of an additional \$1,000 per car over and above the DM&E/DMVW/CP rate. This offer was so cost prohibitive as to be nothing short of ludicrous. Ultimately, BNSF agreed, as a one time accommodation, to move these 75-cars plus an additional 35 to comprise a 110-car shipment at \$2,518 per car to the Pacific Northwest export markets, but has steadfastly refused to allow any other Northville assembled trains to move via Aberdeen to either the Pacific Northwest or the Canadian markets.

13. The rate quotes which we received throughout 2003 revealed that, had Northville been able to ship these 75-car trains via DM&E and DMVW through to Canada, we would have realized a benefit of \$0.10–\$0.13 per bushel additional profit (over and above other available market prices) on each bushel of corn sold. At that time, there were no other sales possibilities and/or rate tariffs which would have generated the same return to North Central. I believe that other elevators on DM&E could have obtained comparable \$0.10–\$0.13 per bushel of additional gains had they been allowed to access Canada through the Aberdeen interchange. This year, the Canadian market is not as active as it was in 2003. It is still a valued option, and a potentially profitable one relative to other markets available to Northville and similar small and medium sized elevators. Further, the Pacific Northwest market continues to be strong, and substantially more profitable than other markets available to Northville and other elevators on the DM&E. BNSF's continuing refusal to allow these elevators to access this market via the Aberdeen interchange will have a comparable adverse effect on those elevators due to the traditionally lower per bushel prices that are available in markets other than Canada or the Pacific Northwest.

14. I anticipate that North Central would be able to assemble and sell at least one 75-car train of corn each month for movement via Aberdeen to the Canadian or Pacific Northwest markets. North Central would be able to realize at least \$0.10-\$0.13 per bushel in additional gain on that corn via those markets as compared to current available markets. I know of no other sale possibilities and/or rate tariffs which would generate the same return to North Central. Since each 75-car train contains 265,000 bushels of corn, North Central would realize a gain of \$26,500-\$34,450 per train. Because North Central is a cooperative association, these monies would flow directly to the benefit of its producer members. As such, failure to obtain continuing passage through Aberdeen would result in a potential monthly loss of \$26,500-\$34,450 per month or \$319,000-\$413,400 per year for our farmer-owners. This is a substantial burden for South Dakota farmers to bear, particularly when compounded by the competition with elevators from other states who are able to access the lucrative Canadian and Pacific Northwest markets.

16. Except as otherwise noted, I have personal knowledge of the facts set forth herein, and if called to testify, could testify competently to the matters stated herein.

Further Affiant Sayeth Not.

Dated this 22 day of July, 2004

Keith Hainy  
Keith Hainy

STATE OF SOUTH DAKOTA     )  
                                      :     SS  
COUNTY OF EDMUNDS     )

On this, the 27<sup>th</sup> day of July, 2004, before me, the undersigned officer, personally appeared Keith Hainy, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(SEAL)

Lisa Johnson  
Notary Public \* South Dakota  
My Commission Expires: 4-16-10

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION**

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY, a  
Delaware corporation,

Court File No. Civ. 03-1003

Plaintiff,

**AFFIDAVIT OF TERRY KNUDSON**

v.

DAKOTA, MISSOURI VALLEY &  
WESTERN RAILROAD, INC., a North  
Dakota corporation,

Defendant.

**CONSOLIDATED WITH**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION**

STATE OF SOUTH DAKOTA by and  
through its SOUTH DAKOTA RAILROAD  
AUTHORITY; and DAKOTA, MISSOURI  
VALLEY & WESTERN RAILROAD,  
INC., a North Dakota Corporation,

Court File No. Civ. 03-3012

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY, a  
Delaware corporation,

Defendant.

I, Terry Knudson, being first duly sworn on oath, deposes and states as follows:

1. I am the General Manager of AgFirst Farmer's Cooperative ("AgFirst") with grain elevator facilities located at Brookings, SD and Aurora, SD.
2. I have been General Manager at AgFirst for 4 years. Prior to joining AgFirst, I held positions at various other grain elevators in South Dakota and North Dakota for 25 years.
3. Between our Brookings and Aurora facilities, we have storage capacity for approximately 2 million bushels of grain and, in an average year, we "turn" the facilities approximately three times. In other words, we effectively receive and ship out about 6 million bushels of grain each year.
4. Our primary commodities are corn (60%), soybeans and wheat.
5. As a "cooperative," we are owned by farmers who have equity in AgFirst, and who receive a share of the year-end profits of the facilities. In addition to buying and selling grain on behalf of our farmer owners, we provide other services to our owners such as sales of livestock feed, fertilizer and propane. As such, our owners have a vested interest in the survival and profitability of the AgFirst elevators.
6. As General Manager of the AgFirst, one of my primary responsibilities is to find markets for our grain, and, in particular, markets providing the best prices. Markets are fluid and the prices can vary from day to day, week to week and month to month. In order to maximize our revenues and the returns for farmers utilizing our facilities, we need to have access to as many markets as possible, to take advantage of the price fluctuations that necessarily and consistently occur in the grain markets.

7. Some of our grain is trucked locally to processors and local ethanol plants. However, well over 50% of our grain is transported by rail to more distant markets. In each case, we are competing with other South Dakota elevators, as well as elevators located in Minnesota and North Dakota for access to the best markets and the best prices.

8. We have a 25-car rail siding at each of our Brookings and Aurora facilities. This means we can load up to a maximum of 25 cars for shipment at one time. We are served by the Dakota, Minnesota & Eastern Railroad ("DM&E"), which has transported our grain to feed lots on the DM&E, local processors, and to the Gulf export markets via barge on the Mississippi River.

9. However, we have been effectively shut out of some of the best available grain markets (particularly for corn) due to actions of the Burlington Northern and Santa Fe Railroad ("BNSF"). BNSF has not been willing to provide competitive rail rates for less than 110-car unit corn trains for the export markets in the Pacific Northwest. This has traditionally been (and continues to be) the best-priced market for corn.

10. With BNSF's refusal to provide competitive freight rates for less than 110-car units, we expected to utilize the DM&E's access via the State of South Dakota's rail lines to move our corn up into the Alberta feed markets in Canada, and to the Pacific Northwest via Canadian Pacific rail routes. Unfortunately, it is my understanding that BNSF has prevented the State and DM&E from making these rail movements as well.

11. Access to the Canadian and Pacific Northwest markets is not merely a desire, it is a need. As I indicated above, our facility does approximately three turns per year (totaling about 6 million bushels). However, we have the capacity to do about five turns per year (about 10 million bushels annually). Despite this capacity, we have been repeatedly advised over the last several years by farmers that they would have to truck their grain to larger 110-car elevators on BNSF due to the price differential between the Pacific Northwest markets and the markets which we can access. I estimate that our facilities have lost over 2 million bushels every year due to lack of this market access and, even when AgFirst obtains the grain from farmers, we often have difficulty sourcing it to markets due to the limited number of markets available to us. For example, during the early part of 2004, we had over a million bushels sitting on the ground for over three months which I was trying to market, but could not do so as a result of lack of market access. Ultimately, we were able to truck the grain to a local market, but the lack of alternate market access cost AgFirst over \$0.03/bushel per month on those million bushels.

12. The lack of access to Canadian markets forces me to put more trucks on the road. In order to service our farmer owners, AgFirst provides fertilizer imported from Canada. However, due to the lack of rail access to Canada, we have had to truck this fertilizer down from Canada.

13. Market access is a primary key to elevator profitability and survival. We are competing with North Dakota and Minnesota elevators that have access to Canada and the Pacific Northwest now. We are also competing with 110-car elevators in South Dakota who have access to the Pacific Northwest markets via BNSF. AgFirst's lack of access to these markets does not put us on a level playing field with our competitors, and damages us in terms of volume and price availability.

14. This lack of access also creates a difficult choice for many of our farmer owners. Some of them have the truck capacity to move their grain over South Dakota's roads to 110-car elevators to obtain a better per bushel grain price in the Pacific Northwest markets. But, when they do so, they adversely effect the profitability of our facility in which they have an equity stake, thereby impacting their return on equity. Many of our farmer owners do not have this choice. They do not have the equipment to truck long distances, and they, therefore, take the best price that we can give them, which is often below that of competitors who have access to the Canadian and west coast markets. By not having access to Canadian and Pacific Northwest markets, we have lost our ability to leverage those markets vis-à-vis our competitors. This is not good for our facility, our farmer owners, or the State of South Dakota. As such, I support the efforts of the State of South Dakota to obtain market access for us and other local elevators via DM&E through Aberdeen.

15. Except as otherwise noted, I have personal knowledge of the facts set forth herein, and if called to testify, could testify competently to the matters stated herein.

Further Affiant Sayeth Not.

Dated this 28<sup>th</sup> day of July, 2004

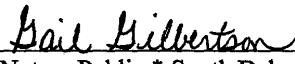
  
Terry Knudson

STATE OF SOUTH DAKOTA     )  
                                      :  
COUNTY OF BROOKINGS     )     SS

On this, the 28<sup>th</sup> day of July, 2004, before me, the undersigned officer, personally appeared Terry Knudson, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

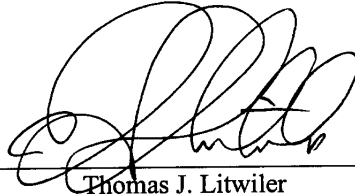
(SEAL)

  
Notary Public \* South Dakota  
My Commission Expires: 7-15-10

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of December, 2004, a copy of the foregoing  
**Petition for Stay of the State of South Dakota** was served by facsimile and overnight delivery  
upon:

Adrian L. Steel, Jr., Esq.  
Robert M. Jenkins, Esq.  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101



Thomas J. Litwiler